No. 464

FILED
SEP 26 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

TSUNE-CHI YU, *Petitioner,*

vs.

CARL BYOIR AND ASSOCIATES, INC.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1940

TSUNE-CHI YU, *Petitioner,*

vs.

CARL BYOIR AND ASSOCIATES, INC.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner (defendant below) asks a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit, reversing with costs a judgment of the District Court for the Southern District of New York. The judgment of the District Court dismissed the complaint, on petitioner's motion made under Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure for the District Courts of the United States for lack of jurisdiction over the subject matter of the action and for failure to state a claim upon which relief can be granted. The Circuit Court of Appeals reversed the judgment of the District Court with costs and held that the motion to dismiss should have been denied.

A brief memorandum was handed down by COXE, D. J., when he granted the motion (R. 13). The decision of the Circuit Court of Appeals, which was unanimous, is embodied in an opinion by Circuit Judge PATTERSON (R. 17 *et seq.*).

Summary Statement of the Matter Involved and Question Presented

Briefly, the question involved is whether the complaint, which is in form against the Consul General of the Chinese Government at New York, is in fact against the Chinese Government itself, and hence violates the rule granting immunity from suit to a friendly sovereign government.

Jurisdiction

The jurisdiction of this Court is invoked under Section 347-a of the Judicial Code.

Reasons Relied on for the Allowance of a Writ

The case, in our view, is within the reason and philosophy of the rule of sovereign immunity. It goes without saying that this rule is of great public and, indeed, international importance.*

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*The importance of giving this rule its full scope is emphasized in a recent article entitled "The Plea of Sovereign Immunity and the New York Court of Appeals," by Professor Deak, in the Columbia Law Review of March, 1940.

There is, so far as we are aware, no decision of this Court ruling on the precise question presented in the instant case. None is cited either in the opinions or in the briefs below.

It is, therefore, submitted that the case comes squarely within subdivision (5)b of Rule XXXVIII of the rules of this Court which, among others, specifies cases "where a circuit court of appeals * * * has decided an important question of federal law which has not been, but should be, settled by this Court" as one of the class of cases in which a review by certiorari may be appropriate.

WHEREFORE it is respectfully prayed that a writ of certiorari be granted to the end that the judgment of the Circuit Court of Appeals for the Second Circuit be reversed and that the case be remanded to the District Court for the Southern District of New York with directions to reinstate the judgment of that court, dismissing the complaint with costs.

Dated, September 25, 1940.

TSUNE-CHI YU,
Petitioner,

By HAROLD RIEGELMAN,
H. H. NORDLINGER,
Of Counsel for Petitioner,
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Supreme Court of the United States

October Term, 1940

Tsune-Chi Yu, *Petitioner,*

vs.

Carl Byoir and Associates, Inc.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions of the Courts Below

The opinion of the District Court appears at R. 13 and is not reported. The opinion of the Circuit Court of Appeals appears at R. 17 *et seq.* and is reported at 112 F. [2d] 885.

Jurisdiction of the Court

A. *Statutory Provision Relied On.*

The jurisdiction of the court is invoked under Section 347-a of the Judicial Code.

B. *Petition Timely Filed.*

The judgment of the Circuit Court of Appeals was made June 27, 1940 (R. 20 *et seq.*). This petition is being filed September 26, 1940.

Nature of the Case and Rulings Below.

The case is one in the District Court for the Southern District of New York. The action, by respondent here as plaintiff against petitioner here as defendant, is based on the allegation that the defendant misappropriated moneys received in trust to pay the same to the plaintiff. The District Court granted defendant's motion to dismiss the complaint (*R.* 11-13). The Circuit Court of Appeals reversed this judgment of the District Court (*R.* 17 *et seq.*). It is to review this decision of the Circuit Court of Appeals that certiorari is sought.

Statement of the Case

The complaint (R. 3 *et seq.*) begins by alleging that the plaintiff is a domestic corporation and that the defendant is the Consul General of China at New York City (paragraphs "I" and "II"). It goes on (paragraphs "III" and "IV") to allege an ordinary cause of action by the plaintiff against the Republic of China for $83,056.49 for work, labor and services claimed to have been performed and moneys claimed to have been advanced by the plaintiff for the defendant. It then alleges (paragraphs "V" —"VIII") that in October, 1938, the Republic of China remitted to the defendant the sum of $22,000, which the defendant received for the account of the plaintiff and in trust to pay over the same to the plaintiff on account of the aforesaid indebtedness; that the defendant without the knowledge or consent of the plaintiff wrongfully converted and appropriated said moneys; that by reason thereof the plaintiff is damaged in the sum of $22,000, no part of

which has been paid, although duly demanded. Jurisdiction of the District Court is based on the fact that the defendant is Consul General of the Republic of China at the City of New York (paragraph "IX"). Judgment is demanded in the sum of $22,000 with interest and costs.

In essence, the ground of the motion to dismiss was that the complaint was an attempt to evade the rule of sovereign immunity from suit, by putting what was in fact a claim against a friendly sovereign government in the form of a claim for breach of trust against the Consul General of that government. Judge Coxe in the opinion referred to above so held, but the Circuit Court of Appeals held to the contrary.

Specification of Error Intended to Be Relied Upon

1. The Circuit Court of Appeals erred in holding that the bringing, maintenance and prosecution of this action was not a violation of the rule granting immunity from suit to a friendly sovereign government.

ARGUMENT

It has, of course, long been settled that claims against friendly sovereign governments can be asserted only through diplomatic channels and cannot be enforced in our courts; and the rule applies likewise to direct or indirect attempts to reach assets belonging to a friendly sovereign government or in which such government has or may assert an interest (*Compania Espanola* v. *Navemar*, 303 U. S. 68; *Hewitt* v. *Speyer*, 250 Fed. 367; *Ezra* v. *La-*

mont, 265 N. Y. 635; *Gallopin* v. *Winsor*, 234 N. Y. App. Div. 601; *Smith* v. *Weguelin*, 15 Weekly Reporter 558, L. R. 8 Eq. 198).

The policy followed is not merely one of protecting the foreign sovereign from financial loss, or to preserve its property in this country, as is the case where the immunity of a city or state is involved. It is also one of preserving the good name of the sovereign and to prevent the public trying out of issues which might cause an upsetting of friendly relations existing between that sovereign and the United States. To quote WHEATON

> "Such interference cannot take place without seriously affecting his [the foreign sovereign's] power and his dignity." (*Wheaton's International Law*, Vol. I, p. 237.)

Can it be said that the dignity of the Republic of China, a friendly sovereign nation, is being afforded such protection if the appellant is allowed to allege in court that the Chinese Government is a defaulting debtor, a charge which the Republic of China cannot deny without making itself a party to the action, so allowing the appellant to accomplish the purpose for which it has brought this suit?

A reading of the complaint in the instant case (R. 3-4), down to and including the fourth paragraph, shows that the complaint alleges a complete cause of action against the Government of the Republic of China for an alleged balance due for work, labor and services performed and moneys advanced.

Knowing, as it must have known, that such claim is not one of which the courts of this country can take cognizance,

the plaintiff has attempted indirectly to accomplish this purpose, at least in part, by the device of alleging the receipt by the defendant, himself an official of the Chinese Government, of funds from that Government in trust for the payment of the alleged claim.

It must be apparent that the action seeks to draw directly into question the rightfulness or wrongfulness of the conduct of the Chinese Government in failing to pay the alleged claim of the plaintiff; that it seeks an adjudication with regard to an alleged fund in which that Government, if the funds exists, has a direct proprietary interest; and that the action thus runs directly counter to the time-honored principle of sovereign immunity from suit in the ordinary civil courts.

In the somewhat analogous case of the immunity of the state and federal governments from suit, it has long been settled (contrary to the opinion expressed by Chief Justice MARSHALL in *Osborn* v. *United States Bank,* 9 Wheat. 738) that the immunity does not depend upon whether the sovereign government in question is a party to the record, but upon whether essentially and in fact the suit is one against the sovereign.

Cunningham v. *Macon & Brunswick R. R. Co.* (109 U. S. 446);
In re Ayers (123 U. S. 443, 487 *et seq.*);
Minnesota v. *Hitchcock* (185 U. S. 373, 387);
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Lankford v. *Platte Iron Works* (235 U. S. 461);
Carolina Glass Co. v. *South Carolina* (240 U. S. 305);

Wells v. *Roper* (246 U. S. 335);
Ex parte State of New York #1 (256 U. S. 490, 500);
Highway Commissioners v. *Utah Co.* (278 U. S. 194);
Worcester County Trust Co. v. *Riley* (302 U. S. 292, 296);
Transcontinental & Western Air, Inc. v. *Farley,* (71 F. [2d] 288, 290 *et seq.*);
Boeing Air Transport Inc. v. *Farley* (75 F. [2d] 765, 768);
Haskins Bros. v. *Morgenthau* (85 F. [2d] 677; certiorari denied 299 U. S. 588).

The statement of the controlling rule by Mr. Justice BREWER, writing for the unanimous court in *Minnesota* v. *Hitchcock, supra,* at page 387, has frequently been followed and never been questioned. It is as follows:

> "* * * If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

For the reasons stated above it is submitted that the action is in actual effect one against the Chinese Govern-

ment and that therefore the rule of the decision last quoted is directly applicable and should have been applied by the Circuit Court of Appeals.

CONCLUSION

It is therefore prayed that the accompanying petition be granted, and that writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit to review the decision of that court.

Dated, September 25, 1940.

Respectfully Submitted,

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New York City.

Office - Supreme Court, U. S.
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OCT 5 1940
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IN THE

Supreme Court of the United States

October Term, 1940.

No. 464.

TSUNE-CHI YU,

Petitioner,

AGAINST

CARL BYOIR AND ASSOCIATES, INC.,

Respondent.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1940.

TSUNE-CHI YU,
Petitioner,
AGAINST
CARL BYOIR AND ASSOCIATES, INC.,
Respondent.
No. 464.

Brief in Opposition to Granting of Writ of Certiorari.

Opinions Below.

The opinion below of the United States Circuit Court of Appeals for the Second Circuit appears at Record, pages 17, *et seq.*, and is reported in 112 F. 2d 885.

The opinion of the United States District Court for the Southern District of New York appears at Record, page 13 and is not reported.

Statement of the Case.

The petitioner is herein designated as the defendant, and the respondent as the plaintiff.

This action is now pending in the District Court of the United States for the Southern District of New York. The Circuit Court of Appeals reversed an order of the

District Court and judgment entered thereon dismissing the complaint (R. 11).

The order of reversal and the mandate based thereon remanded the suit to the District Court, whereafter a motion was made by the defendant for an order directing the service of a bill of particulars by the plaintiff, and, in addition or in the alternative, for the striking out of paragraphs III and IV of the complaint. The motion for a bill of particulars was granted but the application to strike out aforesaid paragraphs of the complaint was denied.

Thereupon, a bill of particulars was served by the plaintiff, and thereafter, on the 14th day of September, 1940 an answer was served by the defendant.

The action, therefore, is now at issue and awaiting trial.

Plaintiff is a New York corporation which, pursuant to contract, performed work, labor and services and expended money on behalf of the Republic of China (R. 3). Said Government, being indebted to plaintiff for said work, labor and services and expenditure of money in the sum of $83,056.49, in August of 1938 remitted to the defendant, its Consul in New York, the sum of $22,000 for the express purpose of paying same to plaintiff (R. 3, 4). Plaintiff alleges that said moneys were received by the defendant in trust for this purpose, that the defendant failed to carry out his agreement or execute the trust, and converted the moneys to his own use (R. 4).

The defendant moved to dismiss on the ground that the suit was an indirect attempt to enforce a claim against a friendly foreign government, and upon the further ground that the Chinese Government was an indispensable party to the action (R. 6).

ARGUMENT.

POINT I.

There being no extraordinary question involved herein, there is no adequate reason why certiorari should be granted after answer and before final hearing and judgment.

Hamilton Brown Shoe Co. v. *Wolf*, 240 U. S. 251.

POINT II.

The present suit is not against the Chinese Government.

Judge Patterson, writing for the Circuit Court of Appeals, said as follows (112 F. 2d 885, 886):

> "The suit is no more against the Chinese Government than an action by A to recover from B moneys sent by the United States to B in trust for A would be an action against the United States. The defendant himself, though consul of a foreign government, is not immune from suit in the federal courts. Judicial Code, section 256, 28 U. S. C., §371, 28 U. S. C. A., §371; *United States* v. *Ravara*, 2 Dall. 297, 1 L. Ed. 388; *Savic* v. *City of New York*, 203 App. Div. 81, 196 N. Y. S. 442."

POINT III.

The complaint showing that the defendant received money in trust for the plaintiff and defendant not having lived up to his trust, the plaintiff may sue.

McKee v. *Lamon,* 159 U. S. 317;
Sayer v. *Wynkoop,* 248 N. Y. 54;
Scott on Trusts, sections 198.1-198.3.

POINT IV.

Petitioner's contention that this suit is an indirect attempt to enforce a claim against the Chinese Government, is baseless.

Accepting as true the allegations of the complaint, it appears that the Chinese Government has not one iota of interest in the moneys received by the defendant. It parted with these moneys when it paid them over to defendant for the purpose of having them applied on the indebtedness due plaintiff.

Lamont v. *Travelers Insurance Company,* 281 N. Y. 362.

POINT V.

The immunity of the Republic of China was not properly presented.

No person has appeared on behalf of the Chinese Republic to claim immunity from suit. So far as appears, the State Department has not even been consulted. In

the absence of such action, the claim of immunity is not properly before the Court.

In re Muir, 254 U. S. 522;
The Pesaro, 255 U. S. 216.

Where the foreign sovereign fails to assert its immunity or appear in the action, immunity is waived and the suit proceeds.

The Sao Vicente, 281 F. 111;
Porto Rico v. *Ramos*, 232 U. S. 627, 34 S. Ct. 461;
De Simone v. *Transportes Maritimos Do Estado*, 199 App. Div. 602.

CONCLUSION.

The Petition for Certiorari Should Be Denied.

Respectfully submitted,

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